Petition not printed

JUN 17 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 843-4

CHARLES MULLEN,

Respondent,

vs.

FITZ SIMONS & CONNELL DREDGE & DOCK CO.,
a corporation,

Petitioner.

ERWIN SAVELA,

Respondent,

vs.

FITZ SIMONS & CONNELL DREDGE & DOCK CO.,
a corporation,

Petitioner.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR REVIEW ON WRIT OF CERTIORARI.

IRVING BREAKSTONE,
Attorney for Respondents,
140 North Dearborn Street,
Chicago 2, Illinois.

UNITED STATES LAW PRINTING CO., 2817 N. HALSTED ST., CHICAGO 14, ILL.

INDEX.

Subject Index.

PAGE

Table of cases, statutes cited ..... i-ii

Summary of Argument, including propositions of law and authorities relied upon 2

Argument 10

Conclusion 20

Table of Cases Cited.

Baltimore S. S. Co. v. Phillips, 274 U. S. 316....3, 4, 14, 15, 17

Charles Nelson Co. v. Curtis, 1 F. (2d) 774.....3, 13

Engel v. Davenport, 271 U. S. 33 (1926).....4, 17

Famous Players v. Lasky Corp., D. C. 30 F. (2d) 402..4, 16

Flynn v. Panama R. Co., 121 Misc. 239, 201 N.Y.S. 56..4, 13

Garrett v. Moore-McCormick Co., 317 U. S. 239.....4, 14

Globe S. S. Co. v. Moss, 245 Fed. 54 certio. den. 245 U. S. 663.....5, 17

Howorth v. U. S. Shipping Board Emergency Fleet Corp., 24 F. (2d) 374, C.C.A. 2nd.....3, 10

John A. Roebling's Sons Co. v. Erickson, 261 Fed. 986 .....3, 4, 13, 14, 16, 17

Johnson v. Panama R. Co., 277 Fed. 859.....5, 19

Kuhlman v. W. A. Fletcher Co., 20 F. (2d) 465....5, 19, 20

PAGE

Leon v. U. S. Shipping Bd. Emergency Fleet Corp., 286 Fed. 681, 682 ..... 5, 18

Owens v. Hammond Lumber Co., 8 F. Supp. 392 (N.D. Cal.) 4, 14, 15, 16

Pacific S. S. Co. v. Peterson, 278 U. S. 139, 49 S. Ct. 75, 73 L. Ed. 220 ..... 3, 13

Panama R. Co. v. Johnson, 264 U. S. 375 ..... 3, 4, 5, 13, 14, 18

Panama R. Co. v. Vasquez, 271 U. S. 557 (1926) 3, 17

Patrone v. M. O. Howlett Inc., 237 N. Y. 394, 143 N. E. 232 ..... 5, 18

State v. Tazwell, 123 Or. 326, 262 Pac. 220 (certio. granted 276 U. S. 613, mem., 48 judgment vacated on other grounds 277 U. S. 575 mem., 48 S. Ct. 527 mem., 72 L. Ed. 995 mem.) 5, 18

Stewart v. Pacific Steam Nav. Co., 3 F. (2d) 329 ..... 5, 18

Talayha (C.C.A. 9) 26 F. (2d) 60, 1928, A.M.C. 1014 ..... 4, 15

The Progress, 21 F. Supp. 572 (D. C. Wash.) 4, 14, 16

The Julia Fowler, 49 Fed. 277 ..... 5, 17

The A. Heaton, 43 Fed. 592 ..... 5, 17

U. S. v. Sakharan Ganesh Pandit (9 cir.) 15 F. (2d) 285, Certio. den. 273 U. S. 759, 47 S. Ct. 473, 71 L. Ed. 878 ..... 4, 15

STATUTES CITED.

46 U. S. C. A. 688; June 5, 1920, c. 250 Sec. 33; 41 Stat. 1007.1 ..... 3, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 843-4

CHARLES MULLEN,

Respondent,

vs.

FITZ SIMONS & CONNELL DREDGE & DOCK CO.,
a corporation,

Petitioner.

ERWIN SAVELA,

Respondent,

vs.

FITZ SIMONS & CONNELL DREDGE & DOCK CO.,
a corporation,

Petitioner.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR REVIEW ON WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

1. **The Complaints Each State A Claim Against The Defendant Upon Which Relief Can Be Granted.**

   (a) An action under the Jones Act is an action in admiralty and under maritime law, and is not one at common law.

   (b) The election required by the Jones Act is not between indemnity and maintenance and cure, but simply between indemnity for unseaworthiness and indemnity under the broader provisions of the Act, as opposed to the general maritime law.

   (c) The Jones Act being an integral part of maritime law, it is implemented by Admiralty Rules not inconsistent with it, and a seaman can recover for maintenance and cure in the same action which disposes of unseaworthy or negligence allegations.

   (d) The seaman's demand cannot be split and prosecuted in several actions, the claims and the tribunal being the same.

   (e) Under the Jones Act recovery can be had for unseaworthiness where the ship lacks safe or proper appurtenances and appliances.

   (f) Claims for maintenance and cure can be asserted in an action under the Jones Act in a court of admiralty irrespective of diversity of citizenship.

PROPOSITIONS OF LAW AND AUTHORITIES RELIED UPON.

I.

The Complaints Each State A Claim Against The Defendant Upon Which Relief Can Be Granted.

46 U. S. C. A. 688; June 5, 1920, c. 250 Sec. 33; 41 Stat. 1007.1.

Howorth v. *U. S. Shipping Board Emergency Fleet Corp.*, 24 F. (2d) 374, C. C. A. 2nd.

(a) An action under the Jones Act is an action in Admiralty, and under maritime law, and is not one at common law.

Panama R. Co. v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748;

Charles Nelson Co. v. *Curtis*, 1 F. (2d) 774.

(b) The election required by the Jones Act is not between indemnity and maintenance and cure, but simply between indemnity for unseaworthiness and indemnity under the broader provisions of the statute, as opposed to the general law.

Pacific S. S. Co. v. Peterson, 278 U. S. 139, 49 S. Ct. 75, 73 L. Ed. 220;

Panama R. R. Co. v. Vasquez, 271 U. S. 557 (1926);

Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316 (1927);

John A. Roebling's Sons Co. v. *Erickson*, 261 Fed. 986 (Certiorari denied 252 U. S. 585, mem. 40 S. Ct. 394 mem. 64 L. Ed. 729 mem.);

Flynn v. *Panama R. Co.*, 121 Misc. 239, 201 N. Y. S. 56;
Engel v. *Davenport*, 271 U. S. 33 (1926).

(c) The Jones Act being an integral part of maritime law, it is implemented by Admiralty Rules not inconsistent with it, and a seaman can recover for maintenance and cure in the same action which disposes of unseaworthy or negligence allegations.

Garrett v. *Moore-McCormick Co.*, 317 U. S. 239;
Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316;
Panama R. Co. v. *Johnson*, 264 U. S. 375;
The Progress, 21 F. Supp. 516 (W. D. Wash.);
Owens v. *Hammond Lumber Co.*, 8 F. Supp. 392 (N. D. Cal.);
Roebling's Sons Co. etc. v. *Erickson*, 261 Fed. 986;
Talayha (C. C. A. S.), 26 F. (2d) 60, 1928 A. M. C. 1014;
Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069;
U. S. v. *Sakharan Ganesh Pandit* (9 Cir.), 15 F. (2d) 285 (certiorari den. 273 U. S. 759, 47 S. Ct. 473, 71 L. Ed. 878).

(d) The seaman's demand cannot be split and prosecuted in several actions, the claims, and the tribunal being the same.

Roebling's Sons Co. etc. v. *Erickson* (2 C. C. A.), 261 Fed. 986;
Owens v. *Hammond Lumber Co.*, 8 Fed. Supp. 392 (D. C.);
Famous Players v. *Lasky Corp.*, D. C. 30 F. (2d) 402;
The Progress, 21 F. Supp. 572 (D. C. Wash.).

(e) Under the Jones Act recovery can be had for unseaworthiness where the ship lacks safe or proper appurtenances and appliances.

Globe S. S. Co. v. *Moss,* 245 Fed. 54, certiorari den. 245 U. S. 663;

The Julia Fowler, 49 Fed. (2d) 77;

The A. Heaton, 43 F. 592.

(f) Claims for maintenance and cure can be asserted in an action under the Jones Act in a court of admiralty irrespective of diversity of citizenship.

Kuhlman v. *W. A. Fletcher Co.,* 20 F. (2d) 465;

Panama R. Co. v. *Johnson,* 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748;

Stewart v. *Pacific Steam Nav. Co.,* 3 F. (2d) 329;

Patrone v. *M. O. Howlett Inc.,* 237 N. Y. 394, 143 N. E. 232;

State v. *Tazwell,* 123 Or. 326, 262 Pac. 220 (certio. granted 276 U. S. 613 mem. 48 judgment vacated on other grounds 277 U. S. 575. mem., 48 S. Ct. 527 mem., 72 L. Ed. 995 mem.);

Leon v. *U. S. Shipping Bd. Emergency Fleet Corp.,* 286 Fed. 681, 682;

Johnson v. *Panama R. Co.,* 277 Fed. 859.

STATEMENT OF THE CASE.

Both of the above actions are brought under the special rule for seamen to sue without surety and prepayment of fees, for personal injuries sustained while in the employ of the defendant, for maintenance and cure and damages for failure to provide expenses of maintenance while incapacitated, both plaintiffs and respondents being seamen in the employ of the defendant corporation.

Upon defendant's motion, the District Court entered its order dismissing both the above complaints, and on appeal to the United States Court of Appeals for the Seventh Circuit, the orders appealed from were reversed and the causes remanded.

In the *Mullen* case, the complaint states first that the action arises under Section 33 of the Merchant Marine Act of 1920, 46 U. S. Code, Section 688, known as the Jones Act; alleges the corporate capacity and office of the defendant in Chicago, Illinois; its ownership of a steam tug boat known as the "ROCHE"; the employment of Mullen by the defendant corporation as an ordinary seaman at the rate of $12.20 per day; the duty of the defendant to provide plaintiff Mullen with a safe and seaworthy vessel, tools and appliances etc.; that on the 29th day of September, 1947, while plaintiff Mullen was in the course of his duties aboard the steam tug boat "ROCHE" in Lake Michigan, at Indiana Harbor, and while the plaintiff was standing on the second step of the stairs leading into the galley to avoid being thrown overboard by reason of a high sea then and there rolling, or to prevent himself from being pitched down into

the galley, or being drenched from the high sea, was then and there steadying himself against the sill of a heavy steel door fastened to the deck house near the galley, on the starboard aft side of said tug boat "ROCHE"; the said door becoming then and there unhooked from its fastening which was insecurely made, and plaintiff's right hand being up against the jamb of the said door, the said door so insecurely fastened and hooked as aforesaid, slammed shut, and crushed, fractured and injured the right hand and fingers of the plaintiff, all of which injuries he sustained as a result of the negligence of the servants of said defendant, in failing to securely and effectively fasten said door and by reason of the defective equipment for the purposes of securing said door in the face of the emergency of the high sea in question, and the unsafe and unseaworthy condition thereof, and the place in which plaintiff was given to work, and thereby plaintiff suffered severe and painful personal injuries."

The complaint then charges that plaintiff's injuries were the result of negligence on the part of the defendant by reason of the breach of its duties as therein set forth and his right to recover under the provisions of the Seamen's Act also known as the Jones Act; alleges no contributory negligence on the part of the plaintiff, demands damages which are set forth, and alleges that the tug boat "ROCHE" was an American vessel, and the plaintiff became a member of the crew at Chicago.

A second separate cause of action is stated in the complaint for maintenance and cure, and a third separate cause of action claims damages for failure of the defendant to provide plaintiffs-respondents with the expense of maintenance while incapacited.

Paragraph Eighteenth of the complaint provides as follows:

> "Pursuant to section 33 of the Merchant Marine Act 1920, plaintiff hereby elects to maintain his action for damages at law with the right of trial by jury and to take the benefit of all statutes of the United States modifying or extending the common law right or remedy in case of personal injury to railway employees."

The complaint in the *Savella* case is practically identical with the complaint in the *Mullen* case, save and except that Savella was injured aboard defendant's steam tug boat known as the "CONNELL" the 24th of July, 1947, "while plaintiff at the instruction of the captain of said tug boat 'CONNELL', was holding a ball point steel chisel in his left hand, which was being then and there struck on the head with an iron sledge wielded by another member of the crew in breaking up concrete between the ribs of said tug forward on the starboard side, the said chisel being then and there defective in that upon being struck by the said sledge so wielded as aforesaid, the said chisel shattered, and a piece of the steel therefrom flew into and imbedded itself in the fleshy part of the inside of the elbow joint of plaintiff's left arm, the said tools including said chisel and sledge being then and there furnished unto the plaintiff and the other members of the crew to do the work aforesaid by the defendant herein, to-wit: Fitz Simons & Connell Dredge & Dock Co., all as a result of the negligence of said servants of the defendants, and the defective operation of said tug, its equipment, appliances and tools, and the unsafe and unseaworthy condition thereof, and the place in which plaintiff was given to work, and thereby suffered severe and painful personal injuries."

To both of these causes of action the defendant filed identical motions, each containing five paragraphs, four of which simply state that each of the complaints fails to state

a cause of action against the defendant upon which relief can be granted, and the fifth of which seeks to strike the entire complaint "as redundant and immaterial."

All of the facts alleged in the complaints are admitted by the motions to dismiss.

The Contested Issues.

1. Whether the complaints state claims against the defendant upon which relief can be granted.

2. Whether in the same complaint a cause of action may be set forth for liability under the Jones Act along with an action for maintenance and cure.

3. Whether a disabled seaman is required to elect between indemnity and maintenance and cure or between indemnity and wages during disability.

4. Whether a claim for maintenance and cure can be asserted in an Admiralty action in the United States District Court in the absence of diversity of citizenship.

ARGUMENT.

I.

The Complaints Each State A Claim Against The Defendant Upon Which Relief Can Be Granted.

In the District Court no authority was cited to the point that either of the complaints failed to state a cause of action, but on the contrary the theory of the defendant, along with that of the Court, seemed to be that the complaints stated a cause of action for maritime tort under general Admiralty law and a cause of action under the Jones Act, and that the respective plaintiffs had failed to elect under which of these causes of action they intended to proceed; that the District Court was without jurisdiction to entertain plaintiffs' second cause of action set forth for maintenance and cure; and that the complaints failed to meet the required rules of Federal Procedure because they were not simple, concise and direct.

Never at any time was any assertion made that either of the complaints failed to state a cause of action against the defendant, the position of the defendant being that the substantive law forbids invoking the general Admiralty law, giving a right to compensatory damages caused by unseaworthiness, and the Jones Act giving a right to compensatory damages caused by negligence.

We cite to the Court a case on all fours with the *Mullen* case, to-wit: *Howorth* v. *U. S. Shipping Board Emergency Fleet Corp.*, 24 F. (2d) 374, C. C. A. 2nd. In that case as here, the absence of a proper hook to cause a door to stay open aboard a vessel in rough water, resulted in a seaman's

action for an injury to his finger sustained by him while the ship was rolling heavily, and the plaintiff seaman put his right hand against the jamb of the door to save himself from falling, when the door suddenly slammed and crushed his finger. The action brought by him was "to recover for personal injuries * * * caused by the alleged negligence of the defendants and unseaworthiness of the steamship West Isleta."

The trial judge held that there was no evidence of unseaworthiness or negligence, and allowed only maintenance and cure to the plaintiff. On an appeal to the Circuit Court of Appeals, in an opinion by Judge Augustus Hand, it was held that the dismissal of the cause of action to recover indemnity was error, and the cause was reversed. The Court said:

> "If the door without the hook was unsafe, the act of the defendants in furnishing unsafe appliance would be negligent. The Merchant Marine Act of 1920 allows recovery for negligence. 41 U. S. Stat. at Large P. 1007; (46 U. S. C. A. Sec. 688) (Comp. St. Sec. 8337a). While there was evidence before the trial court that the hook was broken off before the vessel left port, so that there was some foundation for the claim that the ship was unseaworthy in equipment when she broke ground, there need be no consideration of the technical rule as to unseaworthiness. *Zinell* v. *U. S. Shipping Board Emergency Fleet Corp.* (CCA) 10 F. (2d) 47. A jury must determine whether the absence of the hook rendered the door likely to slam and injure the plaintiff, so that his equipment and place to work were not proper-whether, in port, and defendants were negligent under the law of Master and servant applicable to the situation."

At this point, we direct the attention of the Court to the allegations of paragraphs Eighteen of the complaints which we have set forth in this brief at page 5 hereof. Here is

an out and out election to proceed under the provisions of the Jones Act or the Merchant Marine Act.

The District Court and petitioner have confused the matter of election of remedies by seamen, and the distinct proposition of whether or not the complaints state a cause of action. Admittedly, the injured seamen have a right to proceed for the maritime tort in Admiralty *in personam* against the defendant or at their election to proceed under the Jones Act. In the former case there is a trial before the Judge without a jury, and in the latter case under the Jones Act, trial by the Court with a jury.

The Jones Act provides:

> "That a seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to employees shall apply;" etc.
>
> 46 U. S. C. A. 688; June 5, 1920, c. 250 Sec. 33; 41 Stat. 1007.1.

The election to proceed under this provision of the Jones Act is contained in Paragraph Eighteenth of each complaint.

The provisions of the Jones Act make the Federal Employers Liability Act applicable to recovery for personal injuries of seamen under certain conditions and neither withdraws injuries to seamen from the reach and operation of maritime law nor compels the seaman to do so. The Jones Act brings into the Admiralty maritime law, new rules drawn from another system and affords the seaman the right of electing to proceed either under the Act or under the old rules of maritime law. The election when

made is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system.

Panama R. Co. v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748;

Charles Nelson Co. v. *Curtis*, 1 F. (2d) 774.

The disabled seaman is not required to elect between indemnity and maintenance and cure, nor between indemnity and wages during disability, but is required to elect between the indemnity allowed for unseaworthiness under the general maritime law and the broader right of indemnity afforded by the statute.

Pacific S. S. Co. v. *Peterson*, 278 U. S. 139, 49 S. Ct. 75, 73 L. ed. 220;

John A. Roebling's Sons Co. v. *Erickson*, 261 Fed. 986 (certiorari den. 252 U. S. 585, mem, 40 S. Ct. 394 mem, 64 L. ed. 729 mem);

Flynn v. *Panama R. Co.*, 121 Wisc. 239, 201 N. Y. S. 56.

"No election is required between the right to recover compensatory damages for a tortious injury under the new rule and the contractual right to maintenance, cure and wages under the old rules—the latter being a cumulative right in no sense inconsistent with, or an alternative of the right to recover compensatory damages." *Pacific SS Co.* v. *Peterson, supra.*

(a) In an action at law to recover for an injury a seaman should not be required to elect between his right to indemnity and that to maintenance and cure. *John A. Roebling's Sons Co.* v. *Erickson*, 281 Fed. 986 (certiorari den. 252 U. S. 585 mem. 40 S. Ct. 394 mem. 64 L. ed. 729 mem.).

"The plaintiff should not have been required to elect whether to stand upon his right to wages and expenses of cure and maintenance to the end of the voyage To the latter the seaman is entitled under any and all circumstances except his own wilful misconduct. If he

recover indemnity it will be included; but if he claim indemnity and fail to get it, he is not for that reason to be deprived of his right to wages and expenses of cure and maintenance to the end of the voyage." *John A. Roebling's Sons Co.* v. *Erickson*, 261 Fed. 986, 988 (certiorari den. 252 U. S. 585).

The District Court and petitioner seem to be of the opinion that the complaints state a cause of action under the Jones Act, and under general Admiralty law, and separate causes of action for maintenance and cure, and for damages for failure to provide maintenance and cure and for failure to elect to proceed under the Jones Act or general Admiralty law, but failed to state a claim upon which relief can be granted.

Since the Jones Act is an integral part of maritime law, rights fashioned by it are to be implemented by admiralty rules not inconsistent with the Act.

Garrett v. *Moore-McCormick Co.*, 317 U. S. 239.

The enlarged rules of liability under the Statute, are applicable in admiralty as well as in actions at law.

Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316;
Panama R. Co. v. *Johnson*, 264 U. S. 375.

A seaman can recover maintenance and cure in the same action which disposes of the negligence or unseaworthiness allegations.

The Progress, 21 F. Supp. 517 (W. D. Wash.);
Owens v. *Hammond Lumber Co.*, 8 F. Supp. 392 (N. D. Cal.);
Roebling's Sons Co. etc. v. *Erickson*, 261 Fed. 986 (2nd C.).

These cases hold that two proceedings are needless and cumbersome, and that everything can be accomplished in one proceeding.

"In a suit, either for indemnity in admiralty or under the Jones Act all of the elements of loss recover-

able under maintenance and cure are included in the damages, and if a seaman recovers on either of such causes of action, he may not recover in addition for maintenance and cure if he failed to recover for indemnity under the Jones Act he may still recover his maintenance and cure which arises from his relationship to the vessel and is based upon liability without fault."

Talayha (C. C. A. 9), 26 F. (2nd) 60, 1928 A. M. C. 1014;

Owens v. *Hammond Lumber Co.*, 8 F. Supp. 392 (DCN. D. Cal. S. D.).

The court having jurisdiction to entertain the suit for the maritime tort under Admiralty law or under the Jones Act, has a full right to proceed with the judicial determination of the amount of maintenance and cure to which the plaintiff is entitled.

"A seaman may not recover for loss or injury" more than once if he sues under the Jones Act, as in the instant case, he is entitled to recover for all impairment, physical or mental pain, etc., loss of wages, medicine and hospitalization; and a judgment obtained in such case is *res adjudica* of any further action.

Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316, 47 S. Ct. 800, 71 L. Ed. 1069.

In such action a party must present every element of injury, by the injury complained of, and, if he fails, he may not relitigate the matter in another action. A party is bound by a judgment determining all issues presented, and all claims for recovery which should have been presented.

U. S. v. *Sakharan Canesh Pandit*, 9 Cir. 15 F. (2d) 285; certiorari den. 273 U. S. 759, 47 S. Ct. 473, 71 L. Ed. 878.

A party may not split his demand and prosecute it in several actions, the claims, and the tribunals being the same.

See *Roebling's Sons Co. etc.* v. *Erickson*, 2 Cir. 261 Fed. 986;

See also *Owens* v. *Hammond Lumber Co.*, D. C. 8 F. Supp. 392;

In re: *Famous Players* v. *Lasky Corp.*, D. C. 30, F. (2d) 402.

While the claim in the State Court action under the Jones Act is all inclusive, the same may not be said for an action in Admiralty for the reason that recovery is limited to wages, maintenance and cure for the voyage, nor is a determination by payment of mages, maintenance and cure for the voyage, because there is still an element of damages which may not be included in the wages, maintenance and cure for the voyage.

The Progress, 21 F. Supp. 572 (D. C. Wash.).

In the above cause a seaman after a suit under the Jones Act in the State Courts, sought to bring an action *in rem* by libel against the ship for cure and maintenance, and this right was denied because the one judgment in the State Court concluded the plaintiff. We say therefore in the case at bar the additional cause of action counts for cure and maintenance and for failure to provide same, are fit and proper along with the liability charged in the indemnity action.

We repeat that under the Jones Act, recovery may be had for negligence of the ship owner in failing to furnish the necessary appliances, irrespective of the technical doctrine of seaworthiness; in other words, the employer is under a duty to supply the seaman with a safe place to work, including suitable appliances, and damages resulting from culpable failure to furnish such a place which may or may not be within the doctrine of seaworthiness, may be recovered. A ship lacking safe or proper appurtenances

or appliances is so far unseaworthy with respect to her seamen as to justify recovery for injuries sustained.

Globe S. S. Co. v. *Moss,* 245 Fed. 54; certiorari den. 245 U. S. 663;
The Julia Fowler, 49 F. 277;
The A. Heaton, 43 F. 592.

In *Pacific S. S. Co.* v. *Peterson,* 218 U. S. 130 (1928), "at his election" was construed to mean that the seaman might at his choice, if he desired, maintain an action for compensatory damages, although he had already received of the employer the maintenance, cure and wages accorded in such cases by the old admiralty rules. *Of Engel* v. *Davenport,* 271 U. S. 33 (1926); *Panama R. R. Co.* v. *Vasquez,* 271 U. S. 557 (1926); *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316 (1927). Generally now indemnity, maintenance, cure and wages may all be recovered in the same proceeding.

Roebling's Sons Co. v. *Erickson,* 261 Fed. 986 (C. C. A. 2d 1919).

The District Court and Petitioner seem to be of the opinion also that claims for maintenance and cure cannot be asserted on the common law side of a Federal District Court in the absence of diversity of citizenship. As heretofore set out herein, the action under the Jones Act is under the general Admiralty law and is not an action on the common law side by a Federal District Court.

> "*Kuhlman* v. *W. & A. Fletcher Co.* 20 F. (2d) 465, (a) Carpenter repairing ship. The federal court has jurisdiction of a law action for personal injuries sustained by a ship's carpenter repairing a completed vessel in navigable waters of the United States under Merchant Marine Act, Section 20, as amended by Act June 5, 1920, Section 33. (Comp. St. Section 8337a)."

The provision of the act that "jurisdiction" shall be under the court of the district in which defendant employer resides or in which his principal office is located is construed

as regulating venue, and not "jurisdiction" in the technical sense.

Panama R. Co. v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. ed. 748;

Stewart v. *Pacific Steam Nav. Co.*, 3 F. (2d) 329;

Patrone v. *M. P. Howlett Inc.*, 237 N. Y. 394, 143 N. E. 232;

State v. *Tazwell*, 123 Or. 326, 262 P. 220 (certiorari granted 276 U. S. 613 mem, 48 judgment vacated on other grounds 277 U. S. 575 mem, 48 S. Ct. 527 mem, 72 L. ed. 995 mem).

"The sentence is construed as obviously it must be construed, not as a question of the affirmative bestowal of jurisdiction, but merely a question of venue." *Stewart* v. *Pacific Steam Nav. Co.*, *supra*.

Where suit is brought in the federal courts, it should be prosecuted in the district specified by the statute, even though the injury occurred in a different district, and the fact that plaintiff is a citizen of the same state as defendant does not change the rule.

Leon v. *U. S. Shipping Bd. Emergency Fleet Corp.*, 286 Fed. 681, 682.

"It would seem that Congress intended that jurisdiction should be in that district which could be definitely ascertained. In other words it is very difficult at times to determine whether a defendant is 'doing business' within a certain territory. It is sometimes difficult to determine where a cause of action arose. The act, quoted *supra*, is very clear, and undoubtedly was enacted as much in the interest of seamen as of a defendant. It enables the seamen to lay the venue with accuracy and it does not require the defendant to defend the litigation at some point distant from his or its residence or principal office. It may be inconvenient at times and apparently as applied to the Fleet Corporation, it would seem inconvenient, that the cause should be tried distant from the port where the accident occurred. However, the sole duty of the court is

to construe the statute, as it finds it, and to leave to the Legislature the question of amending the statute, if the legislative body deems such amendment necessary or proper." *Leon* v. *C. S. Shipping Bd. Emergency Fleet Corp., supra.*

Kuhlman v. *W. & A. Fletcher Co.*, 20 F. (2d) 465; *Johnson* v. *Panama R. Co.*, 277 Fed. 859.

The provision of the Act that "jurisdiction" shall be under the court of the District in which defendant employer or in which his principal office is located is construed as legal venue and not "jurisdiction" in the technical sense.

(1) Under the Merchant Marine Act June 5, 1920, Section 33, giving seamen a right of recovery under certain conditions, and authorizing suit within the district in which defendant resides or in which he has his principal office, an action could be brought thereunder in the district in which the employer resided, or in which his principal office was located although plaintiff was a citizen of the same state, notwithstanding a provision of the Judiciary Act (Comp. St. Section 991 (1)) giving federal courts jurisdiction in a common law action for maritime injuries only if the parties are citizens of different states. *Johnson* v. *Panama R. Co.* 277 Fed. 859 (2). The District Court had jurisdiction of this suit—unless finally, the Judiciary Act (Judicial Code Section 24; Code of Laws of the United States p. 866; Comp. Stat. Section 921) defining the jurisdiction of District Court of all suits of a civil nature, at common law—where the matter in controversy—is between citizens of different states, 'applies to suits at common law instituted by seamen in the district courts under section 33 of the Merchant Marine Act. Although the Congress was fully informed of diversity of citizenship of parties as a jurisdictional requirement of the Judiciary Act in respect to common law actions in federal courts, it did not prescribe it as an essential of jurisdiction in the new action at law which it conferred upon seamen by the cited section of the Merchant Marine Act. The only jurisdictional provision it there made is that jurisdiction of such actions shall

be in the court of the 'district' in which the defendant resides or in which his principal office is located. We construe this requirement of a federal court's jurisdiction of this particular action at law to be exclusive of that previously and generally imposed by the Judiciary Act in respect to other 'suits of a civil nature, at common law, and that when fulfilled, it confers on a District Court the requisite jurisdiction of a suit at law by a seaman without regard to his citizenship." *Kuhlman* v. *W. & A. Fletcher Co.*, 20 F. (2d) 465, 468.

It is clear that the District Court, under the complaints in question, is proceeding under general Admiralty or maritime law, and has complete jurisdiction to entertain the cause of action for maintenance and cure etc.

Conclusion.

Since the admitted election is stated in the complaint to proceed under the Jones Act, and all the necessary facts and essential allegations are set forth in the complaint, simply, concisely, directly and briefly for the statement of a cause of action thereunder, as well as for maintenance and cure and for damages for failure to provide the same, the judgment of the United States Circuit Court of Appeals reversing the orders of the District Court and remanding the causes for further proceedings was correct, and for the reasons above set forth, respondents respectfully pray that the petition for a writ of certiorari be denied by this Honorable Court.

Respectfully submitted,

IRVING BREAKSTONE,
Attorney for Respondents.

IRVING BREAKSTONE
140 North Dearborn Street
Chicago 2, Illinois
Telephone—State 2-2922
Attorney for Respondents.